Neutral Citation Number: [2016] EWHC 729 (Fam)

Case number omitted

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 April 2016

Before :

SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

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In the Matter of the Human Fertilisation and Embryology Act 2008
(Case G)

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- -

Miss Deirdre Fottrell QC and Miss Lucy Sprinz (instructed by Goodman Ray) for the applicant
Miss Janet Bazley QC and Miss Sharon Segal (instructed by Russell-Cooke LLP) for the children's guardian
Miss Samantha Broadfoot (instructed by the Government Legal Department) for the Secretary of State for Health
Miss Eleanor Grey QC (instructed by Hempsons) for IVF Hammersmith Limited

Hearing date: 23 February 2016

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SIR JAMES MUNBY PRESIDENT OF THE FAMILY DIVISION

This judgment was handed down in open court

Sir James Munby, President of the Family Division :

1. In *In re A and others (Human Fertilisation and Embryology) (Legal Parenthood: Written Consent)* [2015] EWHC 2602 (Fam), [2016] x WLR xxx, [2016] 1 All ER 273, I had to consider a number of cases which raised issues very similar to those which confront me here. The present case was in fact briefly referred to in *In re A* (see para 9). This is my judgment following the final hearing which took place on 23 February 2016.

The background

2. In my judgment in *In re A*, I set out (paras 6-8) the lamentable background to all this litigation. I referred to the significant number of cases in which the Human Fertilisation and Embryology Authority ("the HFEA") had identified "anomalies". Seven further cases (Cases I, J, K, L, M, N and O) are currently awaiting final hearing. For all I know there may be others pending.

3. There is no need for me to rehearse again the statutory framework and the legal principles which I dealt with in my judgment in *In re A*, none of which has been the subject of challenge before me in this case. I shall therefore take as read, and apply here, my analyses of the statutory scheme under the Human Fertilisation and Embryology Act 1990 and the Human Fertilisation and Embryology Act 2008 (*In re A*, paras 14-25), of the various consent forms which are in use (*In re A*, paras 26-31), of the previous authorities (*In re A*, paras 32-43) and of the three general issues of principle which I addressed (*In re A*, paras 44-63).

4. I add only one thing. I set out (*In re A*, paras 47-48) my analysis of the potential applicability in these cases of the equitable doctrine of rectification and of the principle that the court can, as a matter of construction, 'correct' a mistake if the mistake is obvious on the face of the document and it is plain what was meant. During the hearing in this case I was referred to a number of authorities on these two points. Since, in my judgment, none of them casts the slightest doubt on what I said in *In re A*, I need not further refer to them. In relation to the second, I merely quote what Lord Neuberger of Abbotsbury MR said in *Pink Floyd Music Ltd and another v EMI Records Ltd* [2010] EWCA Civ 1429, [2011] 1 WLR 770, para 21:

> "… before the court can be satisfied that something has gone wrong, the court has to be satisfied both that there has been "a clear mistake" and that it is clear "what correction ought to be made."

The facts

5. For the reasons which I explained in *In re A*, para 66, I propose to be extremely sparing in what I say of the facts and the evidence in this case.

6. The applicant, who I will refer to as X, is a woman who was at all material times in a same-sex relationship with the first respondent, who I will refer to as Y. X is the biological mother, and Y is the gestational mother, of twins, born as a result of IVF treatment provided by a clinic, IVF Hammersmith Limited, which is and was regulated by the HFEA. As their gestational mother, Y is the twins' legal parent. X

seeks a declaration pursuant to section 55A of the Family Law Act 1986 that she is, in accordance with section 43 of the 2008 Act, the legal parent of the twins.

7. Y was at all material times in a civil partnership with, though separated from, another woman, not a party to the proceedings, who I will refer to as CP. Very shortly before the hearing of the application, X and Y separated. (For the reasons I explained in *In re A*, para 65, this is legally irrelevant to anything I have to decide.) Both remain deeply committed to the twins and heavily involved in their care. Despite their separation, Y continues "wholeheartedly" to support X's application, saying that the declaration X is seeking "is of fundamental importance to X but also to the children."

8. I should add that the relief sought by X is not challenged by the children's guardian, by IVF Hammersmith Limited or by the Secretary of State for Health.

9. I have been greatly assisted in my task by the submissions I have had, both written and oral, from Miss Deirdre Fottrell QC and Miss Lucy Sprinz for X, from Miss Janet Bazley QC and Miss Sharon Segal for the children's guardian, from Miss Eleanor Grey QC for IVF Hammersmith Limited, and from Miss Samantha Broadfoot for the Secretary of State for Health. All, with the exception of Miss Grey, had previously appeared before me in *In re A*.

10. I had written evidence from X, Y and CP and, on behalf of IVF Hammersmith Limited, from its senior infertility counsellor, who had been involved with X and Y's treatment, from its quality manager, who was not involved with their treatment but is familiar with the procedures and forms used at that time, and from the consultant gynaecologist who is the director of, and the statutory person responsible for, the clinic. Both X and Y gave oral evidence.

11. I also have the report of the children's guardian, which refers back to the 'generic' report she had prepared for the hearing in *In re A*. It is very positive and entirely supportive of the application. The guardian's view did not change when X and Y separated.

12. Just as in each of the cases I had to consider in *In re A*, so in this case, having regard to the evidence before me, both written and oral, I find as a fact that:

    i) The treatment which led to the birth of the children was embarked upon and carried through jointly and with full knowledge by both the woman (that is, Y) and her partner (X).

    ii) From the outset of that treatment, it was the intention of both Y and X that X would be a legal parent of the child (in the event, the children). Each was aware that this was a matter which, legally, required the signing by each of them of consent forms. Each of them believed that they had signed the relevant forms as legally required and, more generally, had done whatever was needed to ensure that they would *both* be parents.

    iii) From the moment when the pregnancy was confirmed, both Y and X believed that X was the other parent of the child(ren). That remained their belief when the children were born.

iv) Y and X, believing that they were entitled to, and acting in complete good faith, registered the birth of their children, as they believed the children to be, showing both of them on the birth certificates as the children's parents, as they believed themselves to be.

v) The first they knew that anything was or might be 'wrong' was when they were subsequently contacted by the clinic.

vi) X's application to the court is, as I have said, wholeheartedly supported by Y.

vii) X and Y do not see adoption as being a remotely acceptable remedy. Nor, I should say, do I.

I add that there is no suggestion that any consent given was not fully informed consent. Nor is there any suggestion of any failure or omission by the clinic in relation to the provision of information or counselling.

13. At the conclusion of the hearing I made an order declaring that X "is the parent of" the twins. I now hand down judgment explaining my reasons for making that order.

The issues

14. Given the facts and my findings, taken in the context of the analysis in *In re A*, two issues arise. The first relates to the nature of the clinic's error, which differed from those which I had to consider in *In re A*. The second arises out of the fact that Y is and was at all material times in a civil partnership with CP.

Issue (1): the clinic's error

15. As will be appreciated from the analysis in *In re A*, Y, as the gestational mother, should have signed Form WP, and X, as her partner, should have signed Form PP. In fact, and as a result of what is accepted to have been errors by the clinic, Y completed and signed a Form PP and X completed and signed a Form WP. A similar mistake was made in relation to the Form IC signed by both Y and X. These mistakes seem to have arisen, although nothing turns on the point, because of confusion on the part of the clinic resulting from the fact that X was not merely Y's partner but also the child(ren)'s biological mother.

16. In these circumstances, and in the light of my findings of fact as set out in paragraph 12 above, it is common ground, and I agree, that, applying the principles laid down in *In re A*, X is entitled to the relief she seeks. That, in my judgment, is quite clear. What is not so clear, and has been the subject of interesting argument, is whether that is a conclusion I can properly come to simply by a process of *construction* or whether the proper form of order is a decree of *rectification*. Miss Fottrell and Miss Sprinz submit that they can succeed on construction, without having recourse to rectification, though acknowledging that rectification is an appropriate remedy. Miss Grey is agnostic, though accepting that rectification is a remedy available to the applicant. Miss Broadfoot and Miss Bazley and Miss Segal point to rectification alone as being the appropriate remedy.

17. Central to that debate is the decision of the Supreme Court in *Marley v Rawlings and another* [2014] UKSC 2, [2015] AC 129, a case where a solicitor drafted wills in mirror form for a husband and a wife, each of whom, as a result of a mistake by the solicitor, signed the other's will. The mistake was not noticed when the wife died but was identified after the husband's death. The court decreed rectification of the husband's will, in effect by transposing the entire text of the will signed by the wife into the will the husband had signed. As Lord Neuberger of Abbotsbury PSC said (paras 52-53):

> "52 …. The fact that it can be said that the claimed correction would effectively involve transposing the whole text of the wife's will into the will does not prevent it from being "rectification" of each of the wills.
>
> 53 As a general proposition, there may be force in the point that the greater the extent of the correction sought, the steeper the task for a claimant who is seeking rectification. However, I can see no reason in principle why a wholesale correction should be ruled out as a permissible exercise of the court's power to rectify, as a matter of principle. On the contrary: to impose such a restriction on the power of rectification would be unprincipled – and it would also lead to uncertainty."

I should add that, as is apparent from Lord Neuberger's analysis, nothing turns for present purposes on the fact that that case related to a will whereas the present case relates to a very different type of document.

18. There was discussion in *Marley v Rawlings* as to whether the case was properly one of construction or rectification. I start with what Lord Neuberger said at para 40:

> "At first sight, it might seem to be a rather dry question whether a particular approach is one of interpretation or rectification. However, it is by no means simply an academic issue of categorisation. If it is a question of interpretation, then the document in question has, and has always had, the meaning and effect as determined by the court, and that is the end of the matter. On the other hand, if it is a question of rectification, then the document, as rectified, has a different meaning from that which it appears to have on its face, and the court would have jurisdiction to refuse rectification or to grant it on terms (eg if there had been delay, change of position, or third party reliance)."

No such point arises in the present case. Indeed, I have some difficulty in seeing how, in the context of the 2008 Act, a claim for rectification of a Form WP, a Form PP or a Form IC, if otherwise made out, could ever properly be refused on any of the discretionary grounds identified by Lord Neuberger.

19. Lord Neuberger accepted (para 33) that in principle one should consider construction first and before rectification. But in the event, the Supreme Court declined to decide the point of construction. Lord Neuberger explained why (para 41):

> "In my judgment, unless it is necessary to decide this difficult point, we should not do so on this appeal. Interpretation was not the basis on which the courts below decided this case and it was not the ground on which [counsel] primarily relied. Furthermore, and no doubt because of those points, only limited argument was directed to the issue of whether the issue was one of interpretation or of rectification. For the reasons developed below, I consider that this appeal succeeds on the ground of rectification, so I shall proceed on the basis that it fails on interpretation."

20. Miss Broadfoot and Miss Bazley and Miss Segal rightly remark that the precise boundary between interpretation and rectification is not always easy to define, nor, I add, even to discern. The present case, it might be thought, illustrates the point almost to perfection. I am tentatively inclined to think that no acceptable process of construction can here 'save' either the Form WP or the Form PP, but there is no need for me to come to any concluded view.

21. In the light of *Marley v Rawlings*, this is, in my judgment, quite plainly a case where rectification is, in principle, available, and in the circumstances it does not in fact matter whether X succeeds on the one basis or the other. There can, as I have already said, be no basis for refusing relief by way of rectification on any discretionary ground, and, as Lord Neuberger made clear in *Marley v Rawlings* (para 66), rectification operates retrospectively. There is, therefore, no need for me to decide the construction point and it is better that I do not. The matter is best left for determination in a case where the issue both arises and cannot be avoided. Prudence indicates that the President of the Family Division would be unwise to go where the President of the Supreme Court declined to tread.

22. There was debate before me as to what precise form the rectification should take. Miss Broadfoot suggested that a less radical approach would suffice, and helpfully suggested precisely how this might be achieved, but in my judgment wholesale transposition of the printed texts of the two forms is better calculated to achieve the necessary rectification and more closely reflects the underlying error which gave rise to that necessity.

23. There is in the circumstances no need for me to consider whether the Form IC can be 'saved', whether by construction or rectification, and I decline to do so.

Issue (2): the civil partnership

24. The other issue, arising out of the fact that Y is and was at all material times in a civil partnership with CP, relates to the potential impact of section 42 of the 2008 Act, a matter which I touched upon only briefly in *In re A* (see paras 17, 89). As amended, section 42(1) provides as follows:

> "If at the time of the placing in her of the embryo or the sperm and eggs or of her artificial insemination, W was a party to a civil partnership or a marriage with another woman, then subject to section 45(2) to (4), the other party to the civil partnership or marriage is to be treated as a parent of the child unless it is shown that she did not consent to the placing in W of the embryo or the sperm and eggs or to her artificial insemination (as the case may be)."

Section 35, I should add, makes comparable provision where the woman is married to a man. The significance of section 42 in a case such as this is that parenthood is conferred on "the other woman" by section 43 only if "no woman is treated by virtue of section 42 as a parent of the child."

25. In relation to the meaning and effect of section 42, I was referred to a number of authorities: *S v S* [1972] AC 24 (Lord Reid, page 41); *Leeds Teaching Hospitals NHS Trust v A* [2003] EWHC 259 (QB), [2003] 1 FLR 1091 (Dame Elizabeth Butler-Sloss P); *In re R (A Child) (IVF: Paternity of Child)* [2005] UKHL 33, [2005] 2 AC 621 (Lord Walker of Gestingthorpe, para 42); *Re G (Surrogacy: Foreign Domicile)* [2007] EWHC 2814 (Fam), [2008] 1 FLR 1047 (McFarlane J); *M v F (Legal Paternity)* [2013] EWHC 1901 (Fam) (Peter Jackson J); and *AB and CD v CT (Parental Order: Consent of Surrogate Mother)* [2015] EWFC 12, [2016] 1 FLR 41 (Theis J).

26. For present purposes I am content to adopt, with some small adjustments, the submission of Miss Grey as to what these cases demonstrate:

    i) The intention of the 2008 Act and its predecessor the 1990 Act is to provide certainty, which is why there is a presumption.

    ii) Section 42 of the 2008 Act creates a rebuttable presumption that consent exists in cases of marriage or civil partnership. The presumption can be rebutted by evidence which shows that consent has *not* been given.

    iii) Once evidence to counter the presumption has been led, the presumption cannot be used as a 'makeweight'. So even weak evidence against consent having been given must prevail if there is no other evidence to counterbalance it.

    iv) A general 'awareness' that treatment is taking place, or acquiescence in that fact, is not sufficient. What is needed is "consent", and this involves a deliberate exercise of choice.

    I add, as Miss Broadfoot and Miss Bazley and Miss Segal correctly submitted, that whether a person "did not consent" is ultimately a question of fact.

27. In a witness statement signed with a statement of truth, CP said this:

> "I was not involved in any discussions that Y and X had about their plans … I did not give my consent to be treated as a legal parent to any child born as a result of treatment. I was aware that it was Y and X's intention to be the parents, equally, of any

> child born … and I had no intention of being a legal parent to their child … I fully support X's application to be treated as a legal parent to the twins, she is their biological mother."

No one sought to challenge this and CP was not called to give oral evidence.

28. In this case the evidence is clear and unequivocal. CP states in terms that she did not consent. There is no evidence to contradict her. In the circumstances I can be satisfied, as I am, that CP did not consent. Accordingly, section 42 does not stand as an obstacle to the relief sought by the applicant.

29. An unhappy dispute arose between Y and the clinic as to whether or not she had ever told the clinic that she was in a civil partnership with CP. Y is adamant that she did; the clinic did not accept that she had. Unsurprisingly, this dispute has greatly added to Y's and X's distress, and Miss Fottrell and Miss Sprinz accordingly sought to persuade me that I should hear evidence on the point so as to come to a finding of fact. Whilst I hope properly appreciative of the strength of their feelings on the matter, I declined to go down the road which Y and X would have had me traverse. In law, a resolution of this dispute was not relevant to anything I had to decide: the question, as will be apparent, was whether or not CP had consented, and not whether the clinic was aware that Y was in a civil partnership. I therefore heard no evidence in relation to this dispute and accordingly make no findings of fact.

A final matter

30. I referred in *In re A*, para 69, to the evidence I had heard from the parents, which:

> "told of the devastating emotions – the worry, the confusion, the anger, the misery, the uncertainty, the anguish, sometimes the utter despair – they felt when told that something was wrong about the parental consent forms, that, after all they had been through, all the joy and happiness, W's partner might not legally be the parent."

I continued:

> "In one case, where the journey to a successful birth had taken the parents *twelve years* of what was described as grief and pain, it is hardly surprising to learn that they were "devastated and heartbroken" when told by the clinic that the mother's partner was not the child's parent. In another case, the comment was, "it is simply not fair." The words may be understated, but the raw emotion is apparent. Another called the situation "terrible." Another spoke of being "extremely distressed", unable to sleep and "constantly worrying about the future."

31. In the present case, X's evidence was very similar. "At first", she said, "I was both shocked and angry." She found it "deeply upsetting." A later communication from the clinic left her "inconsolable"; she felt that "my whole life had been turned upside down by a phone call." Y's evidence is to similar effect. "Words cannot explain how terrible I felt … I felt sick to the core … I was just in utter shock." When she got over

the initial shock, she was, she said, "extremely angry", not least because they had paid the clinic what she called "a premium price" for the treatment, in fact, as I was told, a sum in excess of £15,000.

32. That is the human reality. It is the entirely unsurprising – in lawyer's language, the reasonably foreseeable – consequence of the kind of incompetence to which the parents in all these cases have been exposed. If ever there was a situation calling for empathy, understanding, humanity, compassion and, dare one say it, common decency, never mind sincere and unqualified apology, it is surely this.

33. In *F v M and the Herts and Essex Fertility Centre* [2015] EWHC 3601 (Fam), Pauffley J was, as it seems to me with every justification, unsparingly critical of the behaviour of the clinic in that case after their mistakes had been discovered. Referring to guidance issued by the HFEA following the judgment of Cobb J in *AB v CD and the Z Fertility Clinic* [2013] EWHC 1418 (Fam), [2013] 2 FLR 1357, Pauffley J observed (para 14):

> "The underlying message was clear. Clinics should have been supporting and assisting parents. They have an obligation to be open and transparent – most particularly with those whose parenthood was potentially disturbed by administrative incompetence. The parents were (and are) the individuals in most need of advice and assistance; they are entitled to and should have been treated with respect and proper concern."

I agree with every word of that.

34. The parents in the present case acknowledge the sympathy and understanding with which they were treated by the clinic's senior infertility counsellor after the clinic's error was revealed, an approach which was reflected in both the tone and the phraseology of her witness statement in June 2015. The attitude of the clinic's solicitors is another matter. Their opening letter, dated 6 February 2015, was cold and impersonal. The writer ended with the comment that "I would encourage you to obtain your own legal advice *if you are able to do so* (emphasis added)." There was, as Miss Fottrell pointedly observes, no offer of funding, though that is a matter which Y had, in my judgment entirely reasonably and appropriately, raised with the clinic in a letter dated 7 January 2015, suggesting that the burden of costs should fall on the clinic given its "gross negligence."

35. The other letter from the solicitors was dated 17 April 2015. It referred to the fact that Y was in a civil partnership and said that "If staff had been aware of the civil partnership, it would have prompted further discussion at the time and you would have been made aware of the legal implications for your family."[1] The letter continued:

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[1] The implication, whether or not intended, that this somehow provided the clinic with a 'let out' was wide of the mark. Ultimately, as we have seen, the question was not what the clinic was told but whether there had been "consent" by Y's civil partner, CP. Perhaps the solicitors, like the clinic, were labouring under what can now be seen to have been the inadequate understanding that, as the clinic had put it in a letter dated 2 December 2014, "if your civil partner was aware of your treatment *and did not object*, she may be deemed to be the legal parent … by virtue of section 42 (emphasis added)." Be that as it may, the best the clinic could offer, in the

> "My client acknowledges, however, that this episode has been very distressing for you both and will have caused much anxiety. My client would therefore like to make an *ex gratia* payment to you of £1,000 in reflection of your experience.
>
> I hope that this proposal will achieve a full and final settlement of this matter."

36. Miss Fottrell and Miss Sprinz with studied moderation characterise this letter as "insensitive, insulting and inappropriate." I agree, but go further. The letter was crass and insensitive, though even to describe it in this way is understatement on the grand scale. X described the offer as "a pathetic financial gesture" which made her feel "extremely insulted." Y said that "It was just insulting to think that the clinic regarded the position they had put our whole family in, could be corrected by a mere financial offering … there was no offer in any shape or form to help correct the situation … there was a complete disregard for the impact their error had on our [children's] lives." I am not surprised. To use the phrase "this episode" to describe what this family had gone through, and were still going through, was grossly insensitive. The phrases "very distressing" and "much anxiety" were little better than formulaic and stand in stark contrast with the language used by X and Y to describe how they felt.

37. The offer of money, whatever the amount, was merely adding insult to injury. And it is to be noted that the offer was not unconditional. It was put forward as being "in full and final settlement" – I can only trust that it was not in fact set as a trap, in the hope that, if accepted, it would set a derisory cap to the clinic's potential exposure to costs. And, if an offer of financial compensation was appropriate at all, the idea that £1,000 began to approach a realistic figure was so wide of the mark as to be not merely insulting but almost offensively so.

38. By the time of a hearing before me in July 2015, the clinic seems to have thought better, offering to pay the applicant's costs of the proceedings. But as late as August 2015, when the director of the clinic made his witness statement, the best that IVF Hammersmith Limited could manage was this mealy-mouthed observation:

> "On behalf of IVF Hammersmith, I regret that any error occurred in relation to the WP and PP forms and I fully accept that this should not have happened. We now have procedures in place to ensure as far as possible that this will not happen again in other cases."

The only extenuating circumstance is that this was before I had handed down, in September 2015, my judgment in *In re A* and before Pauffley J had handed down, in December 2015, her judgment in *F v M*.

39. I place on record, as is only fair, that in her skeleton argument Miss Grey very properly adopted on behalf of the clinic a much more seemly and contrite approach.

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witness statement by its quality manager, responding to what X had said in her witness statement, was the lame explanation, not accompanied by any indication of regret or apology, that, in raising the question of Y's civil partnership, "It was not intended to cause distress or anxiety, or to cause any delay."